

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

JAMES HAYDEN, )  
Plaintiff, ) CASE NO. 1:17-cv-02635-CAB  
v. ) JUDGE CHRISTOPHER A. BOYKO  
2K GAMES, INC., et al., )  
Defendants. )

**PLAINTIFF'S RESPONSE TO MARCH 8 ORDER REGARDING DAMAGES**

Plaintiff James Hayden submits the following Response to the Court's March 8 Order requesting cross-briefs regarding (1) what is the timing for the copyright owner to make the election between actual damages and profits (17 U.S.C. § 504(b)) and statutory damages (17 U.S.C. § 504(c)), and (2) what determinations are for the jury on evidence adduced at trial and what determinations are for the Court on evidence and argument outside the presence of the jury? (Dkt. #273.)

Under 17 U.S.C. § 504(c)(1), Mr. Hayden “may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages[.]” Such election may be made “at any time before final judgment is rendered,” including “even after a jury has returned a verdict on liability and an award of actual damages.” *Cotter v. Christus Gardens*, 238 F.3d 420, at \*4 (6th Cir. 2000). That said, in an effort to streamline the issues for trial, including to simplify the questions for the Court and jury to consider, Mr. Hayden hereby confirms that he is not electing to recover an award of statutory damages. Mr. Hayden will seek a damages award in the form of Take-Two’s profits under 17 U.S.C. § 504(b).

The Parties have both proposed that the amount of Take-Two's profits to be awarded should be determined by the jury on evidence adduced at trial. (See Plaintiff's Amended Trial Brief, Dkt. #267-3, Jury Instruction No. 16, #267-4, Proposed General Jury Verdict Form; Defendants' Second Amended Trial Brief, Dkt. #268-3, p. 29, #268-4, p. 7.) This is a factual matter for the jury to decide. *See ECIMOS, LLC v. Carrier Corp.*, 971 F.3d 616, 636 (6th Cir. 2020); *Balsley v. LFP, Inc.*, 691 F.3d 747, 771 (6th Cir. 2012).

Dated: March 14, 2024

Respectfully submitted,

By: /s/ Andrew Alexander

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 14, 2024, a copy of the foregoing was filed electronically.

Notice of this filing was sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, and parties may access this filing through the Court's system.

/s/ Andrew Alexander

One of the attorneys for Plaintiff